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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. ...545

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Seventh Circuit.**

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

## TABLE OF CONTENTS.


| | Page |
|---|---|
| Prayer | 1 |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statute and Regulations Involved | 2 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 5 |
| Conclusion | 12 |
| Appendices: | |
| A. Opinion of the District Court | 13 |
| B. Opinion of the United States Court of Appeals for the Seventh Circuit | 25 |
| C. Statute Involved | 34 |
| D. Regulations Involved | 36 |


## TABLE OF AUTHORITIES.

**Cases:**


| | |
|---|---|
| United States v. Chicago, B. & Q. R. Co., 237 U. S. 410 (1915) | 9 |
| United States v. Erie Railroad Company, 237 U. S. 402 (1915) | 10 |
| United States v. Northern Pacific Railway Company, 254 U. S. 251 (1920) | 10 |
| United States v. Seaboard Air Line Railroad Company, 258 F. 2d 262 (C. A. 412, 1958) | 10 |

United States v. South Buffalo R. Co., 168 F. 2d 948 (C. C. A. 2nd, 1948) (Cert. Den. 335 U. S. 870 (1948)) ..... 10

**Statute:**

Power or Train Brakes Safety Appliance Act, 45 U. S. C., Sec. 9 ..... 2

**Other:**

49 C. F. R., Sec. 132.12 ..... 2
49 C. F. R., Sec. 132.13 (e) (1) .....2, 5, 7, 8
49 C. F. R., Sec. 132.13 (e) (1) .....2, 5, 8, 9, 12

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**To the United States Court of Appeals for the Seventh Circuit.**

Petitioner, Terminal Railroad Association of St. Louis (TRRA), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 2, 1968. The certified record has been filed with the Clerk of the Court with this petition.[1]

[1] The appendix to the brief submitted by the respondent in the Court below has been certified as the record for use with this petition. The pages have not been renumbered. "P. A." refers to plaintiff-appellant's appendix. "Appendix" refers to the appendix in this petition. The certified record also includes the proceedings in the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW.

The memorandum and order of the District Court filed May 24, 1967, set forth at P. A. 41-53, is not reported. The opinion of the Court of Appeals for the Seventh Circuit, set forth in Appendix A hereto, is not yet officially reported.

## JURISDICTION.

The judgment of the Court of Appeals was entered on July 2, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

## QUESTION PRESENTED.

Whether a through train which is delivered by a trunk line carrier to a terminal carrier for handling by the terminal carrier for a distance of less than 20 miles to connect with another trunk line carrier, and not interchanged, is a transfer train for the purposes of Section 132.13 of the Power Brake Rules (49 CFR 132.13), requiring the brake test prescribed by 49 CFR 132.13 (e) (1).

## STATUTE AND REGULATIONS INVOLVED.

Set forth in Appendix C hereto are Section 9 of the Safety Appliance Act (45 U. S. C., § 9) and Sections 132.12, 132.13 (c) (1) and 132.13 (e) (1) of the Power Brake Rules and regulations (49 C. F. R., §§ 132.12, 132.13 (c) (1) and 132.13 (e) (1).

## STATEMENT OF THE CASE.

A fair and concise statement of the facts in this case as set forth in the opinion of the Court of Appeals is as follows (Appendix B, p. 25):

TRRA is a corporation, the stock of which is owned by several railroads serving the St. Louis gateway from the east and by others serving from the west. It owns a bridge over the Mississippi, and trackage and yards on both sides of the river, in St. Louis, Missouri, and East St. Louis, Illinois. It is principally a terminal and interchange facility for other railroads. The railroads which own stock have the right to use its tracks.

The parties agreed to treat each of two train movements as representative of several counts. The circumstances are not in dispute. The issue concerns the applicability of the regulations.

**The New York Central movement.** A train of 60 freight cars, hauled by a New York Central locomotive, and with a New York Central caboose attached, arrived over the New York Central from Indianapolis, at the legal boundary between the New York Central and TRRA tracks in East St. Louis. The New York Central crew left the train, and the TRRA crew boarded. There was no change of locomotive, caboose, or consist. The TRRA crew operated the train over TRRA tracks to Dupo, Illinois, a distance of about nine miles, for delivery to the Missouri Pacific. As far as waybills and accounting records were concerned, the transaction was treated as an interchange directly between New York Central and Missouri Pacific.

The government claims that the delivery of the train by the New York Central crew to the TRRA crew was an interchange within the meaning of sec. 132.12 and that TRRA was accordingly required to make the initial terminal road train air brake test. TRRA denies that this delivery constituted an "interchange", and contends no test was required. Clearly none would have been required if the New York

Central had remained in control of the train and operated it to Dupo.

**The Missouri Pacific movement.** A train of 123 freight cars, hauled by a Missouri Pacific locomotive, and with a Missouri Pacific caboose attached, arrived from Little Rock, Arkansas over the Missouri Pacific at the Missouri Pacific yards at Dupo, Illinois. The locomotive and caboose were removed, and a TRRA crew coupled on a TRRA locomotive and caboose. This crew made the type of air brake test required by sec. 132.13 (c) (1) "At a point other than initial terminal where locomotive or caboose is changed . . ." The train proceeded over TRRA tracks a distance of eight miles to a TRRA yard, where the cars were eventually delivered to the B. & O. and Pennsylvania railroads.

The government does not claim that the TRRA received this train in interchange, the alleged difference between this movement and the New York Central movement being the change of locomotive and caboose. It claims that this movement was a transfer train movement, making sec. 132.13 (e) (1) applicable, and that since the movement did not exceed 20 miles the initial terminal road train air brake test, pursuant to sec. 132.13 (e) (2), was not required, but the test prescribed by sec. 132.13 (e) (1) was. One of the differences between the (c) (1) test, actually performed, and the (e) (1) test is that in (c) (1) observation of the application and release of brakes on the rear car would suffice, while in (e) (1) it would be necessary to "walk the train", observing application on each car. The latter observation is one of the requirements of the initial terminal test, required for transfer train movements exceeding 20 miles and for trains received in interchange.

TRRA denies this was a transfer train movement. Had the Missouri Pacific crew remained in control,

changed engine and caboose, and operated the train to the TRRA yard, the only test required would have been the one prescribed by sec. 132.13 (c) (1), and it is conceded this test was made. TRRA contends it was required to do no more.

The District Court found TRRA not guilty of violating the provisions of the Safety Appliance Act. The Court of Appeals for the Seventh Circuit held that neither train movement involved an interchange within the meaning of the Power Brake Rules. However, the Court of Appeals found that both train movements were transfer train movements within the meaning of the Power Brake Rules requiring the test prescribed by sec. 132.13 (e) (1) ("walking the train"). TRRA had made the rear end brake test prescribed by sec. 132.13 (c) (1) on the Missouri Pacific train movement but did not perform the "walking the train" test required of transfer trains under sec. 132.13 (e) (1).

TRRA here seeks a review of the Court of Appeals decision which holds the train movements to be transfer train movements.

## REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Seventh Circuit in holding that the train movements in question are transfer train movements requiring a "walking the train" test prescribed by section 132.13 (e) (1) of the Power Brake Rules has decided a Federal question in a way to conflict with the applicable decisions of this Court. The train movements in question were not transfer train movements and are completely distinguishable from transfer train movements as determined by the Supreme Court.

Further, the Court of Appeals in deciding that the movements in question are transfer train movements has created a new definition for transfer trains which conflicts

with the decisions of this Court, and with particular reference to the Missouri Pacific movement, conflicts with the Power Brake Rules promulgated pursuant to the Power Brake Law.

1. The railroad tracks of TRRA have been used merely to connect a through train movement between the New York Central lines and the Missouri Pacific lines at Dupo, Illinois, and between the Missouri Pacific lines and the B. & O. and Pennsylvania Railroads. In the New York Central movement the train originated at Indianapolis, Indiana to be delivered to the Missouri Pacific Railroad at Dupo, Illinois. Absolutely no switching, or assembling of cars took place on this train movement, once the train left Indiana and was received by Missouri Pacific Railroad at Dupo. In the Missouri Pacific movement, the train originated at Little Rock, Arkansas, for connection with the Pennsylvania Railroad and B. & O. Railroad. At Missouri Pacific's Dupo yards a TRRA locomotive and caboose were attached to the train in place of the Missouri Pacific locomotive and caboose. Again no assembling or switching of cars took place on this train movement once the train left Little Rock, Arkansas.

The Court below found that the two movements in question were not interchanged between TRRA and the trunk lines but that the interchange was between the trunk line carriers. TRRA agrees with the Court's ruling on the matter of interchange.

However, the Seventh Circuit did err in holding that the movements in question were transfer train movements. By so holding, the Seventh Circuit would require TRRA to make a brake test which it is not required to make under the Power Brake Rules.

In the New York Central movement, a TRRA crew was simply substituted for a New York Central crew in the connection between the New York Central and Missouri

Pacific. It is to be noted that the Seventh Circuit acknowledged that if there were no crew change between the New York Central and TRRA, absolutely no brake test would be required (Appendix B, p. 25).

In the Missouri Pacific movement, only a caboose and locomotive are changed on the Missouri Pacific's property at Dupo, Illinois, on the movement originating at Little Rock, Arkansas, hence at a point other than an initial terminal. Section 132.13 (c) (1) of the Power Brake Rules requires only the rear end car test "at a point other than initial terminal where locomotive or caboose is changed . . ." Again, the Court of Appeals acknowledges that no other test would be required if the change of the caboose and locomotive had been made by the Missouri Pacific crew (Appendix B, p. 27).

TRRA made the rear end test on the Missouri Pacific movement which, according to the exact language of sec. 132.13 (c) (1), is all that it is required to do. The facts of this case fit identically into the type of brake test performed and required to be performed by TRRA in the Missouri Pacific movement. The Power Brake Rules make no fine distinction as to who employs the train crew or owns the locomotives and cabooses.

Thus having found that no interchange took place in either of the movements, the Seventh Circuit should have found that the rear end test performed by TRRA in the Missouri Pacific movement was identical to that required under sec. 132.13 (c) (1) of the Power Brake Rules, since only a caboose and locomotive were changed at a point other than the initial terminal.

The fact that neither the New York Central nor Missouri Pacific movement was as a matter of law a transfer train will hereinafter be established. Insofar as the New York Central movement is concerned, there is absolutely nothing in the Power Brake Law or the rules promulgated

thereunder which requires TRRA to make any brake test on a through train movement which is not a transfer train, and where, as found by the Court, no interchange has taken place. The Seventh Circuit, therefore, has erred in holding that the TRRA is required to make any brake test in the New York Central movement and requiring TRRA to make a test in the Missouri Pacific movement different from that prescribed by section 132.13 (c) (1) of the Power Brake Rules where a caboose and locomotive have been changed at a point other than the initial terminal. The decision of the Circuit Court which requires TRRA to make the "walking the train" test required on transfer trains under sec. 132.13 (e) (1) when, in the New York Central movement, no test is required and in the case of the Missouri Pacific movement the rear end test of 132.13 (c) (1) is only required, places a burden upon TRRA not required by law.

2. Neither the Missouri Pacific nor the New York Central movement is a transfer train movement, but by so holding, the Seventh Circuit's opinion conflicts with prior decisions of this Court. Emphasis is given to the fact that both train movements were through movements without interchange involvement of TRRA as specifically found by the Seventh Circuit. In neither case involving TRRA was there any assembling or switching of cars. The only changes made in the complete train make-up occurred in the Missouri Pacific movement where a caboose and locomotive were changed at the Dupo yards, which is a point other than the initial terminal.

Each day, in the course of its operations, TRRA assembles many trains in its yards for delivery to various trunk lines in the area. These trains are made up of cars which have been interchanged to Terminal by an inbound carrier. TRRA switching crews assemble these cars into trains and deliver them to an outbound carrier. These

trains are known as "transfer trains", and before moving them, the TRRA crews "walk the train", i. e., they make the brake test prescribed by 49 CFR 132.13 (e) (1).

The distinction between a transfer train and the complete, through Missouri Pacific and New York Central movements is clear. The trains involved were complete, through trains moving from an initial terminal where the trains were made up to an ultimate destination point as contrasted with the transfer of cars from a switching, assembling or classification yard for delivery to another such yard to ultimately make up the complete, through train.

Inasmuch as there was no assembling, switching or breaking of the cars prior to or after their handling by TRRA, neither the Missouri Pacific nor the New York Central train was a transfer train.

A transfer train is one in which cars are received in a train yard, switched and assembled into a train and then transferred to another yard. A transfer train is in effect a temporary grouping of cars which will eventually be made up into a road train.

In **United States v. Chicago, B. & Q. R. Co.**, 237 U. S. 410 (1915) this Court considered the question of whether the Safety Appliance Act applied to transfer trains. In defining transfer train operations, this Court stated that the yards of the defendant railroad were ". . . used for receiving and breaking up incoming trains, assembling and starting outgoing trains, and assorting, storing, and distributing cars. To reach their ultimate destinations, whether on defendant's road or on those of other carriers, a large proportion of the cars have to be moved from one yard to the other and this is accomplished by transfer trains which are run over the mainline track connecting the yards. These trains usually consist of an engine and approximately thirty-five cars, are operated by what are

termed yard or switching crews, and carry no caboose or markers . . ." l. c. 411, 412.

In **United States v. Erie Railroad Company,** 237 U. S. 402 (1915), in applying the Safety Appliance Act to transfer trains, this Court referred to transfer trains which were defined as trains which ". . . usually have about twenty-five cars, do not carry a caboose, are drawn and operated by engines and crews specially engaged in that service, and have flags and signal lights differing somewhat from those on other trains, but answering the same purpose. They are not run according to fixed schedules, but at irregular intervals under the orders of yard masters and according to block signals . . ." l. c. 404, 405.

The concurring opinion of Circuit Judge Sobeloff in **United States v. Seaboard Air Line Railroad Company,** 258 F. 2d 262, 268 (C. A. 4th, 1958), pointed out that the Supreme Court's definition of transfer train in the Erie Railroad case referred to "temporary groupings of cars" moving to and from freight yards following the break up of trains bound in a certain direction and prior to the assembly of trains moving in another direction.

**United States v. Northern Pacific Railway Company,** 254 U. S. 251 (1920) also considered transfer trains as movements of cars to be assembled, switched or classified.

In **United States v. South Buffalo R. Co.,** 168 F. 2d 948 (C. C. A. 2nd, 1948) (Cert. Den., 335 U. S. 870 (1948)), Circuit Judge Augustus Hand, speaking for the Court, stated l. c. 951:

> "In the present case fifteen cars which had been assembled at one point were moved as a unit for about two miles to another point where they were to be broken up for further disposition without any cars being added or cut off over the route. We believe

that this is a transfer of cars from one switching point to another . . .'

From the foregoing decisions it is clear that a transfer train is nothing more than the movement of cars from one rail yard to another to be assembled into a through train, switched or classified. It is the transfer of temporary groupings of cars prior to their being classified and assembled into a complete train or after a through train has been broken up and the cars are being distributed to the rail yards. It is also obvious that neither the New York Central movement nor the Missouri Pacific movement is a transfer train. None of the elements which make up a transfer train operation is present in either the Missouri Pacific or New York Central movements. The New York Central move was a through train originating at Indianapolis, Indiana and delivered by a TRRA crew at Dupo, Illinois. There was no change of train consist and certainly no movement of a temporary grouping of cars which had been assembled or classified immediately prior to their handling by the TRRA crew. The same situation was true in the Missouri Pacific movement on the train originating at Little Rock, Arkansas for connection with the B. & O. and Pennsylvania Railroads. Again, this was no temporary grouping of cars which had been classified or assembled immediately prior to their handling by the TRRA crew. Neither was the handling by the TRRA crew of either movement for the purpose of delivering a temporary grouping of cars for assembling, switching or classification. The facts in the instant case clearly distinguish between the operations in the New York Central and Missouri Pacific movements and those involving transfer trains. As pointed out by the Court below, the New York Central and Missouri Pacific movements were complete, through train movements with interchange between the trunk line carriers, the New York Central and Missouri Pacific and the Missouri Pacific and B. & O. and Pennsylvania Railroads.

Since neither train was a transfer train, the Court of Appeals erred in holding that TRRA is required to make the "walking the train" brake test prescribed by Section 132.13 (e) (1) for transfer trains. This Court has established the definition of a transfer train. The Court of Appeals, in holding that the involved train movements are transfer trains when there is no transfer involved, has established a new definition for transfer trains which conflicts with that established by this Court. As a result of the decision of the Court of Appeals, TRRA would be required, in the Missouri Pacific movement, to make a brake test different from that required of it under the Power Brake Rules where no transfer train is involved and at a point other than at initial terminal where a locomotive and caboose are changed, and would be required to make a brake test in the New York Central movement where none is required under the Power Brake Rules. Writ of certiorari should therefore be granted to resolve the conflict.

## CONCLUSION.

For the reasons herein contained, this petition for writ of certiorari should be granted.

Respectfully submitted,

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